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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RONALD DURHAM, Defendant and Appellant.	H034944 (Santa Clara County Super. Ct. No. CC809305)

Defendant Ronald Durham was convicted after jury trial of grand theft of personal property of a value exceeding $400. (Pen. Code, §§ 484, 487, subd. (a).)[1] The jury also found true an allegation that defendant took property of a value exceeding $65,000 within the meaning of section 12022.6, subdivision (a)(1). The court suspended imposition of sentence and placed defendant on probation for five years with various terms and conditions, including a one-year county jail sentence suspended until April 2, 2010. The court also ordered defendant to pay victim restitution in the amount of $132,463.85.

On appeal, defendant contends that (1) the trial court violated his constitutional rights by instructing the jury with CALJIC No. 14.46; (2) trial counsel rendered ineffective assistance by failing to request a pinpoint instruction; (3) the trial court

[1] All further statutory references are to the Penal Code.

committed reversible error by failing to give CALJIC No. 2.71; and (4) the trial court violated his constitutional rights by failing to give a unanimity instruction with respect to the enhancement allegation. As we find no reversible error, we will affirm the judgment.

BACKGROUND

Defendant was charged by information with one count of grand theft of personal property of a value exceeding $400. (§§ 484, 487, subd. (a).) The information further alleged that defendant took property of a value exceeding $65,000, within the meaning of section 12022.6, subdivision (a)(1).

The Trial Evidence

Ralph Colet ran a family business for years during which he was involved in buying, selling, and leasing trucks and business vehicles. In May 2005, Colet was introduced to defendant by a friend of Colet's wife. Defendant had a trucking company that also bought trucks and leased them to others. On May 24, 2005, Colet and defendant entered into a written agreement whereby Colet provided $64,972.85 to defendant for defendant to purchase and resell using Vida Lines, Inc. (Vida), three Peterbilt trucks, identified by defendant in the contract by their serial numbers. Title to the trucks was to be transferred to and held by Colet until their resale, and the net profit from the resale was to be "split 50/50" between the two men. Colet wire transferred the money that day to Vida's bank account because defendant said the trucks were coming out of a lease soon and could be bought before they were put out to auction. Defendant told Colet that he would get the trucks within a month. Colet was hoping to make at least a $30,000 profit from the transaction.

While Colet was waiting for delivery of the three trucks, defendant approached Colet with another possible deal. Defendant was servicing vehicles for Sierra Water Company (Sierra) that he knew Sierra was leasing. The leases were about to expire but Sierra wanted to continue leasing the vehicles. Defendant proposed buying the vehicles and leasing them to Sierra. Defendant showed Colet a Peterbilt truck being serviced at

defendant's company, and he said that the truck was like the trucks they would be buying. Colet gave defendant a cashier's check dated June 14, 2005, for $22,291 to cover Colet's 50 percent ownership of one truck. Colet expected monthly income of $700 from the transaction. However, Colet and defendant had no written agreement regarding the transaction.

On June 17, 2005, Colet wire transferred $52,000 to a bank account for Valley Mortgage on behalf of defendant so defendant could purchase two more trucks for resale. A friend had given Colet one-half of the amount so that he could go through with the transaction, but Colet later gave his friend the money back. Colet expected to have the trucks delivered by July 1, 2005, and resold by July 15, 2005, and to make a profit of between $20,000 and $30,000.

For a short time, defendant sent Colet $700 a month to cover the lease payment on the Sierra truck. However, Colet did not receive the titles for any of the trucks as planned. On July 11, 2005, Colet sent defendant an email message asking about the status of all three agreements. Regarding the first three trucks, defendant told Colet that he had dealt with this company before, that it takes a long time to get the paperwork done, and that it might take a month or two longer to get the titles. Regarding the last two trucks, defendant said that he had purchased the trucks but the company that had been leasing them wanted to continue to do so and would make monthly lease payments to them. Defendant said that it would take time for him to get the titles for the trucks. Colet agreed to the lease arrangement on the last two trucks and he received $3,400 a month as the lease payment.

Colet stopped receiving lease payments after October 2005. Defendant gave Colet a check dated December 5, 2005, for $6,800 to cover missing payments to that date, but the check was bad. However, they went to defendant's bank and defendant gave Colet cash to cover that check. Colet did not receive any more money from defendant.

In 2006, Colet told defendant that he wanted either the titles for the trucks or his money back. Defendant told Colet that he could put in a demand for money from some real estate transactions that defendant was involved in, and he gave Colet a form to fill out. On March 6, 2006, Colet filled out the form demanding $100,000 from the real estate transaction as his payoff. However, defendant did not have any active escrows at the time. Defendant never gave Colet either the titles to the trucks or any lease documents. Colet filed a police report on September 19, 2006.

San Jose Police Officer Cynthia Calderon ran the vehicle serial numbers defendant provided in the May 24, 2005 contract through the Department of Motor Vehicles, but she found no matches. The officer tried various combinations, such as treating what looked like a "G" as a "6," but she still found no records. Copies of defendant's business bank account records were admitted into evidence. They showed that the money Colet gave defendant was deposited into defendant's account, but the money was then taken out in cash and by checks written to people unrelated to the Colet transactions.

The defense rested without proffering any testimony or other evidence.

Verdicts and Sentencing

On August 4, 2009, the jury found defendant guilty of grand theft of personal property exceeding $400 (§§ 484, 487, subd. (a)), and separately found true the allegation that the value of the property taken exceeded $65,000, within the meaning of section 12022.6, subdivision (a)(1). On October 23, 2009, the court suspended imposition of sentence and placed defendant on probation for five years with various terms and conditions, including a one-year county jail sentence suspended until April 2, 2010. The court also ordered defendant to pay $132,463.85 in victim restitution.

DISCUSSION

CALJIC No. 14.46

The court instructed the jury that it could find defendant guilty of theft either under a theory of theft by trick and device, or under a theory of theft by embezzlement.

(CALJIC No. 14.00.) The court instructed the jury that the specific intent required for theft is satisfied by either an intent to deprive an owner permanently of his or her property, or to deprive an owner temporarily, but for an unreasonable time, so as to deprive him or her of a major portion of its value or enjoyment. (CALJIC No. 14.03.) The court further instructed the jury pursuant to CALJIC No. 14.46 that, "[i]t is not a defense to a prosecution for theft that after the theft was committed, complete or partial restitution or offer of restitution was made to the owner of the stolen property, or that his loss was wholly or partly covered by any other means." There is nothing in the record indicating that defendant objected to the giving of CALJIC No. 14.46 or that he requested that the trial court modify it in any way.

Defendant now contends that the court had a sua sponte duty to modify CALJIC No. 14.46 "in order to alert the jury that [his prompt lease] payments constituted relevant evidence that bore on the specific intent element of the theft charge." He argues that "[t]he fact that [he] initially performed under his agreements with Mr. Colet has a strong tendency to support the defense theory that [he] lacked a specific intent to steal Mr. Colet's money." The Attorney General contends that defendant's argument regarding the court's sua sponte duty to modify CALJIC No. 14.46 "lacks merit. CALJIC [No.] 14.46 is a correct statement of law and the court was not required to instruct the jury as to how they should view the lease payments."

"In a criminal case, a trial court has a duty to instruct the jury on ' " ' "the general principles of law relevant to the issues raised by the evidence." ' " ' [Citation.] The 'general principles of law governing the case' are those principles connected with the evidence and which are necessary for the jury's understanding of the case. [Citations.] As to pertinent matters falling outside the definition of a 'general principle of law governing the case,' it is 'defendant's obligation to request any clarifying or amplifying instruction.' [Citation.]" (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) " 'If defendant believed that the instruction [given] was incomplete or needed elaboration, it was his

responsibility to request an additional or clarifying instruction.' [Citations.] He made no such demand . . . ." (*People v. Carpenter* (1997) 15 Cal.4th 312, 391-392 (*Carpenter*).)

When the instructions given are correct and adequate, the court has no sua sponte duty to provide amplification or explanation. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778 (*Mayfield*).) The court " 'need not instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction.' [Citations.]" (*People v. Garvin* (2003) 110 Cal.App.4th 484, 489.) " '[I]f an instruction relates "particular facts to the elements of the offense charged," it is a pinpoint instruction and the court does not have a sua sponte duty to instruct.' [Citation.]" (*Ibid.*; *Mayfield, supra,* 14 Cal.4th at p. 778.)

"Restoration of property feloniously taken or appropriated is no defense to a charge of theft. [Citations.]" (*People v. Pond* (1955) 44 Cal.2d 665, 674; *People v. Holmes* (1970) 5 Cal.App.3d 21, 25 (*Holmes*); see also *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 810 (*Sisuphan*); §§ 512, 513.) "[O]ffers of restoration, in whole or in part, [are] only matters which the court might consider in mitigation of punishment." (*People v. Costello* (1951) 107 Cal.App.2d 514, 518; *Holmes, supra,* at p. 25.) Thus, CALJIC No. 14.46 is a correct statement of the law and the court had no sua sponte duty to provide amplification or explanation of that instruction.

Defendant separately contends that, "[a]ssuming that there was no sua sponte duty to modify CALJIC [No.] 14.46 to explain that the lease payments were relevant to the defense theory of the case, [defendant] alternatively contends that he was deprived of the effective assistance of counsel by his trial attorney's failure to request an instruction which qualified the 'return of property is no defense' principle of CALJIC [No.] 14.46 by telling the jury that it could properly consider evidence that [defendant] gave Mr. Colet money in the form of monthly lease payments in determining whether [defendant], at the time of the taking, had the required intent to deprive Mr. Colet of his property." The

Attorney General contends that the record "does not support [defendant's] claims of deficient performance or prejudice."

"A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Price* (1991) 1 Cal.4th 324, 440; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) We "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

"A criminal defendant is entitled, on request to a[n] instruction 'pinpointing' the theory of his defense. [Citations.] . . . [H]owever, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories 'is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.' [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 570.) The trial court can refuse a proffered instruction that highlights specific evidence or invites the jury to draw inferences favorable to one of the parties from specified items of evidence. (*People v. Hughes* (2002) 27 Cal.4th 287, 361 (*Hughes*).)

In this case, had defendant requested a pinpoint instruction inviting the jury to draw inferences favorable to him from evidence that he made some monthly payments to Colet beginning immediately after the three transactions, the court could have properly considered such an instruction " 'argumentative' " and could have properly concluded that it therefore should not be given. (*Hughes*, *supra*, 27 Cal.4th at p. 361.) Defense counsel did argue to the jury that defendant started to make the lease payments of $700

and $3,400 a month as he had promised regarding the second and third transactions, and that defendant did so because "[h]e was trying to accommodate and he was trying to make sure that he was keeping up his end of the bargain." Counsel further argued: "[T]hese are not Mr. Durham's words, this is what Mr. Colet himself told you, and this is telling about what Mr. Durham's intentions were at the time they entered into this contract." "[H]e was trying to comply with his side of the agreement, and obviously that did not work, but failure to keep up your end of the bargain for whatever reason does not equal criminal behavior." As defendant was able to present his theory of defense by cross-examination of Colet and by counsel's argument to the jury, defendant has not shown that it is reasonably probable a more favorable determination would have resulted had counsel requested a pinpoint instruction relating his lease payments to his theory of defense.

CALJIC No. 2.71

During Colet's testimony, he stated that defendant made promises to him to induce him into the three transactions and, when Colet questioned defendant about the status of the transactions, defendant made additional statements and promises. For instance, Colet testified that defendant told him that defendant would get the trucks within a month, that it takes time to get the titles to the trucks, and that he could put in a demand for money in the real estate transactions that defendant was then a party to. Defendant now contends that, "[t]his testimony was indirect evidence of [his] intent to commit grand theft, and thus [were] statement[s] ' "tending to establish guilt." ' " "In light of [these] statements, the trial court was under a sua sponte duty to instruct the jury pursuant to CALJIC [No.] 2.71." The Attorney General contends that "the challenged statements are not truly 'admissions' requiring an instruction. Further, even if some or all of them were, any error in failing to give a cautionary instruction with respect to those statements would be harmless."

CALJIC No. 2.71 states: "An admission is a statement by [a][the] defendant which does not itself acknowledge [his][her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his][her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an oral admission of [a][the] defendant made not in court should be viewed with caution.]" " 'The cautionary language instructs the jury to view evidence of an *admission* with caution. By its terms, the language applies only to statements which tend to prove guilt and not to statements which do not.' [Citation.]" (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 (*Slaughter*).)

The court should instruct the jury sua sponte to consider with caution any out-of-court statement made by a defendant tending to show his or her guilt unless the statement was written or otherwise recorded. (See CALCRIM No. 358; see also *People v. Beagle* (1972) 6 Cal.3d 441, 455 (*Beagle*); *Carpenter, supra*, 15 Cal.4th at p. 392.) While it is error for the court to fail to give such an instruction whenever an extrajudicial statement by the defendant is admitted and the prosecution relies on it to establish the defendant's guilt, the failure to do so "does not constitute reversible error if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. [Citations.]" (*Beagle, supra,* 6 Cal.3d at pp. 455-456; *Carpenter, supra*, 15 Cal.4th at p. 393.) "Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1268 (*Pensinger*); see also *People v. Stankewitz* (1990) 51 Cal.3d 72, 94 (*Stankewitz*).) The error is harmless where there was " 'no evidence that the statement was not made, was fabricated, or was

inaccurately remembered or reported.' " (*Carpenter*, *supra*, 15 Cal.4th at p. 393; *Stankewitz*, *supra*, 51 Cal.3d at p. 94.)

In this case, defendant's extrajudicial statements were admitted through Colet's uncontradicted testimony, but Colet did not attempt to quote defendant or to state the exact words defendant used. Colet simply testified as to his general understanding of the terms and conditions of the deals that he and defendant entered into and to what defendant's general responses were to his inquiries about the status of the deals. Defendant never denied making any of the statements attributed to him; there was no conflicting testimony concerning the context or meaning of defendant's statements; and the jury was also presented copies of defendant's written agreement, Colet's check and wire transfers, and defendant's bank records. Thus, at issue was whether Colet was a credible witness or had fabricated his testimony regarding defendant's statements. The court instructed the jury with CALJIC Nos. 2.13, 2.20, 2.21.1, on how to judge the believability of a witness, which provided the jury with guidance on how to determine whether to credit any or all of Colet's testimony. In addition, to the extent that defendant's statements to Colet were exculpatory, they were not admissions to be viewed with caution. (*Slaughter*, *supra*, 27 Cal.4th at p. 1200.) Accordingly, we find that there is no reasonable probability that a result more favorable to defendant would have been reached had the court instructed the jury with CALJIC No. 2.71.

Unanimity Instruction

The court instructed the jury pursuant to CALJIC No. 17.01 as follows: "The defendant is accused of having committed the crime of grand theft in count 1. [¶] The prosecution has introduced evidence for the purpose of showing that there is more than one act or omission upon which a conviction may be based. [¶] Defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of the acts or omissions. [¶] However, in order to return a verdict of guilty to count 1, all jurors must agree that he committed the same act or omission or acts or omissions. [¶] It

is not necessary that the particular act or omission agreed upon be stated in your verdict." Immediately thereafter, the court instructed the jury pursuant to CALJIC No. 17.17 as follows: "It is alleged in count 1 that in the commission of the crime charged that with the specific intent to do so, defendant took property and that the loss caused hereby exceeded sixty[-]five thousand dollars ($65,000.00). [¶] If you find the defendant guilty of the crime charged, you must determine whether this allegation is true or not true. [¶] The People have the burden of proving the truth of this allegation. [¶] If you have a reasonable doubt that it is true, you must find it to be not true. [¶] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose."

Defendant now contends that the court erred in failing to instruct the jury that all jurors must agree that he committed the same acts or omissions in order to find the excessive taking allegation true. "[T]here was danger that the jury could find the enhancement allegation true based on two different factual scenarios, neither of which was believed by all twelve jurors. Viewed in this light, it was necessary, on the facts of this case, for the trial court to give CALJIC [No.] 17.01 in relation to the $65,000 property enhancement." The Attorney General contends that defendant's contention "is without merit. The court clearly gave the unanimity instruction with respect to count one. The jury found [defendant] to be guilty of grand theft. The jury was then asked whether the amount of the theft was greater than $65,000, which the jury found to be true. No additional unanimity instruction was required."

"A criminal verdict must be unanimous with the members of the jury agreeing that the defendant is guilty of a specific crime. [Citation.] Thus, 'when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act.' [Citation.] The unanimity instruction ' "is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order

to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count." [Citation.]' [Citation.] 'The same reasoning should, in general, apply to enhancements as well as the crimes that underlie them.' [Citation.]" (*People v. Hernandez* (2009) 180 Cal.App.4th 337, 347-348; *People v. Robbins* (1989) 209 Cal.App.3d 261, 265.)

Even if we were to conclude that the unanimity instruction should have been given in this case with respect to the enhancement, we do not agree with defendant that the failure to give it was prejudicial. "Failure to give a unanimity instruction is governed by the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 . . . which requires the error to be harmless beyond a reasonable doubt. [Citation.]" (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) "Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]" (*Ibid.*, citing *People v. Jones* (1990) 51 Cal.3d 294, 307.)

In this case, the evidence suggested more than one discrete crime, the prosecutor did not make an election, and the court required the jury to agree on the same criminal act in order to find defendant guilty of theft as charged in count 1. (CALJIC No. 17.01.) The unanimity instruction prevented the jury from convicting defendant of theft based on two different factual scenarios, neither of which was believed by all 12 jurors. Once the jury unanimously found defendant guilty of theft as charged in count 1, the court required the jury to find whether the criminal act the jury unanimously relied on to find defendant guilty also caused the victim to suffer a loss in excess of $65,000. (CALJIC No. 17.17.) Viewed in this light, it was unnecessary, on the facts of this case, for the court to give CALJIC No. 17.01 in relation to the excessive taking enhancement. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248 [the absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole].)

Any error in failing to give the unanimity instruction in relation to the excessive taking enhancement was therefore harmless.

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MIHARA, J.

_____
DUFFY, J.